

State of Minnesota by Rebecca Lucero,  
Commissioner of the Minnesota Department  
of Human Rights,

Plaintiff,

**SETTLEMENT AGREEMENT AND  
RELEASE OF CLAIMS**

vs.

MDHR File No. 63872

Ramsey County,

Defendant.

This Settlement Agreement and Release of All Claims ("Agreement") is entered into by and between Commissioner of Human Rights Rebecca Lucero ("Commissioner Lucero"), T.D., K.E., and Ramsey County. Commissioner Lucero, T.D., K.E., and Ramsey County shall be collectively referred to as the Parties.

WHEREAS, T.D. filed a charge of discrimination against Ramsey County on behalf of her then-minor daughter, K.E.;

WHEREAS, the Minnesota Department of Human Rights ("MDHR") conducted an investigation into the allegations asserted in T.D.'s charge;

WHEREAS, MDHR made a finding of probable cause to believe that Ramsey County violated the Minnesota Human Rights Act ("MHRA");

WHEREAS, Commissioner Lucero intends to file a complaint against Ramsey County in District Court asserting allegations of employment discrimination based on the results of MDHR's investigation;

WHEREAS, Ramsey County disagrees with the conclusions of MDHR's investigation and the allegations in Commissioner Lucero's proposed complaint;

WHEREAS, the Parties have reached an agreement to resolve this matter and mutually desire to avoid the burden and expense of further litigation and wish to resolve their dispute in an amicable manner;

NOW, THEREFORE, IN CONSIDERATION OF the mutual promises and covenants contained in this Agreement, including the relinquishment of certain legal rights, the Parties now agree as follows:

1. **Compliance with Act.** Ramsey County reaffirms its commitment to comply with the Minnesota Human Rights Act, Minn. Stat. ch. 363A.

2. **Lump Sum Payment.** In consideration for the Release of All Claims contained in this Agreement, and as an inducement for Commissioner Lucero, T.D., and K.E. to enter into this Agreement, Ramsey County will pay a one-time sum of seventy-two thousand five-hundred dollars (\$72,500). While Ramsey County expressly denies engaging in any wrongdoing and disputes the claims asserted by T.D., K.E., and Commissioner Lucero, the payment outlined in this Paragraph will be designated to compensate K.E. for any claims, known or unknown, that have been raised or that could be raised related to K.E.'s employment by Ramsey County. Ramsey County will send the payment to K.E.'s attorneys, made payable to K.E., and provide K.E. with a 1099 form. Ramsey County will make payment promptly, and will make best efforts to provide payment within seven to ten business days of the effective date of this agreement. The payment shall specify the Department file number assigned to the charge that gave rise to this matter, charge 63872, and be sent to Laura Pfeiffer, Winthrop & Weinstine, P.A., 225 South Sixth Street, Suite 3500, Minneapolis, MN 55402-4629. Contemporaneously, Ramsey County will send verification of the payment to the Commissioner of the Minnesota Department of Human Rights at 625 North Robert Street, St. Paul, MN 55155.

3. **Policy Review, Training, and Reporting.** In additional consideration for the Release of All Claims contained in this Agreement, and as an inducement for T.D., K.E., and Commissioner Lucero to enter into this Agreement, Ramsey County Parks and Recreation agrees to engage in the following:

- a. **Policy Review.** Ramsey County Parks and Recreation agrees to provide updated copies of its Staff Manuals for its beaches and waterworks employees to verify that such policies include sexual harassment policies. Ramsey County Parks and Recreation agrees to provide copies of such policies to the Commissioner of Human Rights at 625 Robert Street North, St. Paul, MN 55155, within sixty (60) days of the effective date of this agreement.

Ramsey County Parks and Recreation agrees to include the language in Exhibit A to this agreement in its staff manuals for beaches and waterworks employees. For a period of three (3) years from the effective date of this agreement, Ramsey County Parks and Recreation agrees to submit any proposed modifications to the language included in Exhibit A to this agreement to MDHR for review and approval. Such submissions shall be sent to the Commissioner of Human Rights at 625 Robert Street North, St. Paul, MN 55155. The Commissioner of Human Rights shall have sixty (60) days from the receipt of any such proposed modifications to provide written feedback or it shall be presumed that the Commissioner approves any such proposed modifications.

Ramsey County shall ensure and verify that each of its beaches and waterworks employees has received and reviewed a copy of the current Staff Manual.

- b. **Training.** For a period of three (3) years beginning May 1, 2020, Ramsey County Parks and Recreation agrees to annually train, at the start of the summer season, Senior Lifeguards and Aquatics Supervisors/Park Service Coordinators (or any successor or substantially equivalent position) on Ramsey County Parks and

Recreation's obligations under the Minnesota Human Rights Act, with an emphasis on sexual harassment, and the Supervisor/Employee Relations Policy. Within thirty (30) days after completing the training, Ramsey County Parks and Recreation shall submit to MDHR verification that the training has been completed, including the names of the individuals completing the training, the names of the individual(s) who conducted the training, the date(s) the training occurred, the length and content of the training, and that each individual received a copy of the current Staff Manual at or before the training. Respondent shall send the verification to the Commissioner of the Minnesota Department of Human Rights at 625 Robert Street North, St. Paul, MN 55155. MDHR will have thirty (30) days from receipt of the verification to notify Ramsey County Parks and Recreation of any concerns with the training.

- c. **Reporting.** For a period of three (3) years following the effective date of this agreement, Ramsey County Parks and Recreation agrees to report to MDHR, on an annual basis: (1) the number of complaints made under Ramsey County Parks and Recreation's Staff Manuals for Beaches Waterworks, and/or any policy modified through the review process described in paragraph 3(a) the steps Ramsey County Parks and Recreation took to investigate the complaints; and (3) the outcome of Ramsey County Parks and Recreation's investigation.

- 4. **Government Data.** The Parties acknowledge that the release of information concerning this matter from the files of MDHR and Ramsey County Parks and Recreation is governed by the Minnesota Human Rights Act, Minn. Stat. ch. 363A, the Minnesota Government Data Practices Act, Minn. Stat. ch. 13, and the Official Records Act, Minn. Stat. §§ 15.17, *et seq.* The Parties agree that the terms of this Agreement are public pursuant to Minn. Stat. § 363A.06, subd. 4. The Parties agree that the information identified as public data in Minn. Stat. § 363A.35, subd. 3 is public following the closure of this file.

- 5. **Release of All Claims.** In consideration for the payment outlined in Paragraph 2 and the training, policy review, and reporting requirements outlined in Paragraph 3, and as an inducement for Ramsey County to enter into this Agreement, all Parties agree that this Agreement is a full, final and complete settlement, compromise and satisfaction of the claims pending before MDHR.

- a. Commissioner Lucero, on her own behalf and on behalf of MDHR, hereby releases and forever discharges Ramsey County and its past and present employees, agents, insurers, attorneys, officials, and officers from ANY AND ALL CLAIMS, ACTIONS, AND CAUSES OF ACTION related to the charge that gave rise to this matter, Charge 63872.

- b. T.D. and K.E., on their own behalf, and on behalf of their agents, representatives, attorneys, assignees, heirs, executors, and administrators, hereby covenants not to sue and releases and forever discharges Ramsey County and its past and present employees, agents, insurers, officials, and officers from ANY AND ALL CLAIMS, ACTIONS, AND CAUSES OF ACTION, which Charging Party has or may have against Ramsey County and its past and present agents, servants, officers, subsidiaries, clients, shareholders, directors and employees, whether or not T.D. or K.E. now knows of those claims, actions, and causes of action against Ramsey County. This release includes, but is not limited to, any claims T.D. or K.E. may have under Title VII of the Civil Rights Act of 1964, as amended, the Minnesota Human Rights Act or any other federal, state, or local civil rights laws, or any common laws, defamation, infliction of emotional distress, negligence, tort liability, direct or vicarious liability, and any attorneys' fees or other costs or expenses. T.D. and K.E. acknowledge that this release includes all claims that T.D. or K.E. is legally permitted to release. T.D. and K.E. acknowledge and specifically agree that the release applies to and includes the claims encompassed in T.D.'s Charge. T.D. and K.E. agree not to initiate any further legal proceedings related to the Charge, and agree to dismiss any currently pending legal proceedings related to the Charge. T.D. and K.E. specifically agree to the closure of MDHR file No. 63872 and acknowledge that T.D. and K.E. will not receive a Notice of Right to Sue.
6. **Claims Not Waived By T.D or K.E.** By signing this Agreement, T.D. and K.E. do not release or waive the following: (a) any rights or claims that are based on any events that occur after she signs this Agreement; (b) any right to institute legal action for the purpose of enforcing this Agreement; (c) any right to apply for unemployment compensation benefits; or (d) any claims arising under the Workers' Compensation Act, although Ramsey County or its insurer may contest such claims; (d) any claim against [REDACTED] in his individual capacity.
7. **Claims Not Waived By Commissioner Lucero.** By signing this Agreement, Commissioner Lucero, on behalf of herself and MDHR, does not release or waive the following: (a) any rights or claims that are based on any events that occur after she signs this Agreement or (b) any right to institute legal action for the purpose of enforcing this Agreement.
8. **Rescission under the MHRA.** T.D., K.E., and Commissioner Lucero recognize that by signing this Agreement they, along with MDHR, are waiving and releasing any discrimination and retaliation claims that they might have under the MHRA. The Parties agree that T.D.'s, K.E.'s, Commissioner Lucero's, and MDHR's release of claims under the MHRA is given in settlement of a claim T.D. filed with the MDHR as part of a charge of discrimination and a lawsuit Commissioner Lucero and MDHR intended to initiate as a result of T.D.'s discrimination charge. In accordance with the provisions of Minnesota Statutes section 363A.31, subdivision 2, T.D.'s, K.E.'s, Commissioner Lucero's, and MDHR's release of claims under the MHRA will become final upon the effective date of this Agreement.

9. **Responsibility for Costs.** Each Party is responsible for its own costs, expenses, and attorney's fees associated with this Agreement and T.D.'s charge of discrimination against Ramsey County.
10. **No Wrongdoing.** This Agreement is not to be considered an admission of liability or wrongdoing by or on behalf of Ramsey County. The Parties are entering into this Agreement for the purpose of resolving a disputed claim and avoiding the burdens and costs associated with protracted litigation.
11. **Voluntary Agreement.** The Parties acknowledge that no person has exerted undue pressure on them to sign this Agreement. Each Party is voluntarily choosing to enter into this Agreement because of the benefits that are provided under this Agreement. The Parties acknowledge that they have read and understand the terms of this Agreement, that they have been represented by legal counsel or had the opportunity to retain legal counsel, and that they are voluntarily entering into this Agreement to resolve the dispute among them.
12. **Choice of Law, Forum and Severability.** This Agreement is governed by the laws of the State of Minnesota regardless of T.D. or K.E.'s domicile or status as a resident of Minnesota or any other state. The Parties agree that Minnesota's state and federal courts will have exclusive jurisdiction over any dispute arising out of this Agreement. If a court determines that any part of this Agreement is unlawful or unenforceable, the remaining portions of the Agreement will remain in full force and effect.
13. **Tax Consequences.** T.D. and K.E. acknowledge and agree that neither Ramsey County nor any of its insurers, attorneys, agents, employees, or representatives have made any statements or representations regarding the tax consequences of the payment being made pursuant to this Agreement. It is specifically agreed and understood that K.E. is solely responsible for determining any tax consequences related to the payment outlined in Paragraph 1 and for paying any taxes she may owe as a result of said payment. It is further agreed that K.E. will defend and indemnify Ramsey County for any taxes, penalties, and or interest incurred the County may incur a result of K.E.'s failure to satisfy her tax obligations.
14. **Medical Liens.** The parties represent that none are aware of any liens or subrogation claims against the proceeds of this agreement. K.E. agrees to defend and indemnify Ramsey County against any Medicare or Medicaid claims, or any other liens, damages, conditional payments, and rights to payment, if any, including attorneys' fees related to the proceeds of this agreement, and Plaintiff further agrees to waive any and all private causes of action for damages pursuant to 42 U.S.C. § 1395y(b)(3)(A) et seq.
15. **Settlement Agreement.** This Agreement is binding. The Parties acknowledge that they have been advised that (1) the other parties have no duty to protect their interest or provide them with information about their legal rights, (2) signing this Agreement may

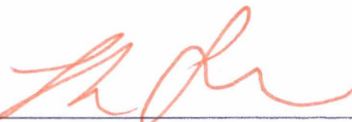
adversely affect their legal rights; and (3) they should consult an attorney before signing this Agreement if they are uncertain of their rights.

16. **Entire Agreement.** This Agreement constitutes the entire agreement between the Parties. No Party has relied upon any statements, promises, or representations that are not stated in this document. No changes to this Agreement are valid unless they are in writing, identified as an amendment to this Agreement, and signed by all Parties. There are no inducements or representations leading to the execution of this Agreement except as herein explicitly contained.
17. **Effective Date and Counterparts.** The Effective Date of this Agreement shall be the date on which it is fully executed by all Parties. This Agreement may be executed in multiple counterparts, which shall be construed together as if one instrument. Any Party shall be entitled to rely on an electronic or facsimile copy of a signature as if it were an original. The parties have caused this Agreement to be signed on the dates opposite their signatures.

REBECCA LUCERO, COMMISSIONER OF THE MINNESOTA DEPARTMENT OF HUMAN RIGHTS

Date:

7/24/19



Rebecca Lucero, on Behalf of Herself and the Minnesota Department of Human Rights

RAMSEY COUNTY MINNESOTA

Date:

7/18/19

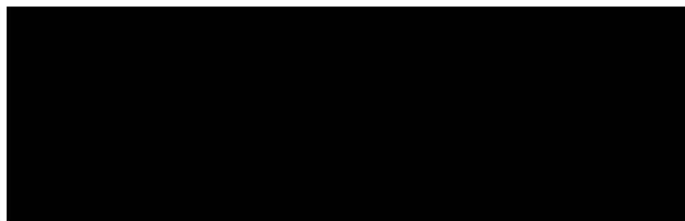


Name: Mark McCabe

Title: Director of Park & Recreation

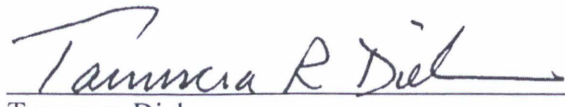
K.E.

Date: 7/18/2019



T.D.

Date: \_\_\_\_\_

  
\_\_\_\_\_  
Tammera Diehm

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# Exhibit A



## Supervisor/Temporary Employee Relations Policy

Ramsey County Parks and Recreation Department prohibits relationships of a sexual or amorous nature between a supervisor and any employee under the age of 18, in accordance with Minnesota state law which states that minors under the age of 18 are unable to provide consent to enter into relationship with a supervisor of any age.

The department also prohibits supervisors from being alone (at a worksite or in a vehicle) with any employee, under the age of 18.

Violation of this policy may result in discipline up to and including termination.

Any employee with knowledge of a violation of this policy must report the violation as soon as practicable to Ramsey County Human Resources at: [contact information.]

Failure to report a violation of this policy may result in discipline up to and including termination.  
Employees will not be subject to discipline or retaliation for good faith reports of violations of this policy.

MEMORANDUM

The Minnesota Department of Human Rights has completed its investigation of the above-referenced matter. Based upon the results of that investigation, the Commissioner makes the following determination:

1. Evidence is sufficient to conclude there is **PROBABLE CAUSE** to credit the Charging Party's allegation of an unfair discriminatory practice by the Respondent, as prohibited by Minnesota Statutes, § 363A.08, subd. 2(3).
2. The Charging Party, on behalf of her minor child, alleged her minor child was discriminated against in the area of employment, on the basis of sex, as prohibited by the Minnesota Human Rights Act (Act).

FACTS

3. The Charging Party is the parent of a female child (Child), who was a minor during the events in question. The Child's date of birth is August 13, 1996.
4. In the summer of 2013 the supervisor at issue here, the aquatics supervisor (Supervisor) whose date of birth is September 3, 1991, was 21-years-old.
5. The Respondent hired the Child in May of 2013 as a lifeguard. The Supervisor was involved with the Child's hire.
6. On May 28, 2013, the Child signed the Respondent's seasonal employee workplace conduct policy and rules. At the time of hire, the Child was 16-years-old.
7. As a matter of policy, any Respondent lifeguard must be at least 16-years-old to work at a waterworks location. Any lifeguard at least 18-years-old or graduated from high school may be assigned to work at a beach. The Child was assigned to work at a waterworks due to her young age.
8. Per the Respondent's beach operations manual, aquatics supervisors were expected to supervise lifeguard activities and manage the day to day operations at the beaches and waterworks. Aquatics supervisors' duties and responsibilities included, but were not limited to: recruiting, interviewing, and training lifeguard candidates, and evaluating personnel.
9. The Respondent's beach operations manual also instructs employees: "If you are assaulted, immediately call 9-9-1-1 and notify the aquatics supervisor."
10. Between August 13, 2013 and August 18, 2013, the final week of the Respondent's aquatics season, the Supervisor requested the Child's assistance and reassigned her to work with him at a beach.
11. During that final week of the Respondent's aquatics season, the Supervisor was 21-years-old, and the Child turned 17-years-old.

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12. While working at the beach, the Supervisor engaged in sexual contact with the Child. The Child indicated she repeatedly opposed the sexual contact; however, the Supervisor persisted and engaged in sexual intercourse with the Child.
13. After the sexual contact, the Supervisor drove with the Child in a Respondent vehicle and purchased Plan B emergency contraception for the Child.
14. After the incident, during the final week of August 2013, the Child disclosed to a Respondent park services coordinator that she had sexual contact with the older Supervisor on Respondent property during the work day. The park services coordinator took no action aside from encouraging the Child to discuss the matter with a relative who also worked for the Respondent.
15. In 2014 the Child reapplied for seasonal employment as a lifeguard with the Respondent. On June 5, 2014, the Child started work as a Respondent lifeguard.
16. During the first few weeks of June 2014, the Child told other Respondent employees that she was not comfortable around the Supervisor.
17. Sometime in June of 2014 the Child made, what the Respondent termed an "off-hand comment" about the August 2013 incident to a senior lifeguard.
18. The senior lifeguard engaged in an independent inquiry, before reporting the issue to the Respondent's human resources (HR) on or about June 26, 2014.
19. The Respondent indicated it subsequently initiated an investigation and placed the Supervisor on a paid administrative leave.
20. At some unknown point in 2014, after being placed on paid administrative leave, the Supervisor resigned his employment with the Respondent.
21. On July 22, 2014 a felony criminal complaint was issued against the Supervisor for his actions toward the Child at the end of August 2013. A "Statement of Probable Cause" was submitted in support of the criminal complaint which contained investigative information provided by both the Child and the Supervisor.
22. On August 12, 2014, the Charging Party filed this charge of discrimination on behalf of the Child alleging sexual harassment.

PRELIMINARY ISSUES

23. The Respondent unsuccessfully raised several preliminary issues in its Answer. The Department will address these preliminary issues prior to analyzing the sex-based discrimination claim at issue in the charge of discrimination.

Preliminary Issue One – Standing

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24. The Respondent raised arguments regarding improper standing. The respondent's claims were not persuasive.
25. The Respondent asserted the Child was no longer a minor and should, therefore, be required to file a new charge with the Department. The Respondent alternately claimed the child was 21-years-old, and later that she was 19-years-old, at the time the charge of discrimination was filed. The respondent cited caselaw to support its position: *McCarthy v. Anable*, 7 N.Y.S.2d 887 (N.Y. 1938) (citing *Waring v. Crane*, 1830 WL 2717 (N.Y. Ch. 1830) (Holding an "infant will be liable in the same manner as if the suit had been commenced by an adult."); and *Maryland Cas. Co. v. Owens*, 74 So.2d 608 (Ala. 1954) (Holding "[a]n executor occupies a position of trust.").
26. The Respondent is mistaken; the Department has determined the Charging Party correctly has standing in this matter.
27. The caselaw cited from the Respondent – overlooking its age (1938 and 1954) and the fact it was from jurisdictions without direct authority over Minnesota's courts and agencies – did not reference applicable subject matter. Instead of referencing the filing of administrative charges of discrimination, the Respondent's cases were limited to guardian ad litem, criminal, and wills/trusts matters.
28. Interestingly, determining the appropriateness of standing did not require looking to 62-year-old caselaw from Alabama, it involved a review of Minnesota's own current Administrative Rules. Rule 5000.0400, Subp.1a states, "The charge of an allegedly aggrieved minor or ward must be filed by a parent or guardian." (Emphasis added.)
29. No one disputed the fact the Child was a minor at the time of the August 2013 incident. Comparing the charge of discrimination's date of filing (August 12, 2014) with the Child's date of birth (August 13, 1996) conclusively established that the Child was still 17-years-old, one day shy of her 18<sup>th</sup> birthday, when this charge was filed.
30. Given the Child's age on August 12, 2014, when the charge was filed, Minnesota's Administrative Rules required the charge to be filed by "a parent or guardian," as was the case here.
31. Direct and clear instructions from the Minnesota Administrative Rule 5000.0400, subp. 1b provides, "A charge must be filed within one year of an alleged unfair discriminatory practice." (Emphasis added.)
32. The Charging Party has standing and is a proper party to this charge because: (1) the Child was a minor at the time of filing; (2) the Charging Party is the mother of the Child; (3) and the Charging Party filed the charge within one year of the alleged incident, as required by Minnesota's Administrative Rules.

Preliminary Issue Two – Jurisdiction

33. The Respondent indicated the Department lacked jurisdiction to hear this case because the Supervisor was no longer employed by the Respondent when the charge was filed on August 12, 2014. The Respondent did not provide any legal citations or case law to support its position.
34. Minnesota Statute § 363A.28, subd. 1 provides, "Any person aggrieved by a violation of this chapter may bring a civil action as provided in § 363A.33, Subdivision 1." Subdivision 4 further provides, "The first application of an unfair discriminatory practice, employment policy, or seniority system to a new person establishes a basis for the filing of a claim by that person."
35. The Act is clear the Charging Party may file a charge before this Department on behalf of her Child at the "first application" of unfair discriminator practice. There was no statutory requirement that the alleged wrongdoer remain employed with the Respondent in order to preserve this Department's jurisdiction over a charge of discrimination.

Preliminary Issue Three – Supervisor Status

36. Finally, the Respondent asserted the Supervisor had no management authority over the Child; that he was never a supervisor. The Respondent stated the Supervisor was a "Park Services Coordinator" who was identified by different titles (including Aquatics Supervisor) "to help customers and staffs know who they were talking to."
37. A review of the Respondent's 2014 posting for the position of "Lifeguard," the position held by the Child, revealed, "[f]or further information about this job posting or screening process, contact [Supervisor], **Aquatics Supervisor**, at [...]" (Emphasis added.) This established that the Supervisor was titled Aquatics Supervisor and that he, individually, had a role in the application and screening process of Lifeguard applicants.
38. The Supervisor's role as having hiring authority for the Child was strengthened by a review of the felony criminal "Statement of Probable Cause" against the Supervisor which summarized information provided to criminal investigators by the Supervisor. In this statement the Supervisor is quoted as telling investigators: "I'm trying to think when I hired her [referring to the Child]."
39. The felony criminal "Statement of Probable Cause" also quotes the Child as telling the Supervisor, "You're a boss [...]." This "boss" status of Supervisor having authority over Lifeguards, including the Child, was reinforced repeatedly by witnesses who consistently referred to the Supervisor as the Child's "boss."
40. A reading of the Respondent's beach operations manual revealed that aquatics supervisors had significant authority over the operation and management of the beaches and waterworks worksite. Relevant here, the manual provides that lifeguards are to "notify the aquatics supervisor" in emergency circumstances.
41. Witnesses indicated the Supervisor had the authority to dictate the location of the Child's duties. Though she was too young to be assigned anywhere but the waterworks, Supervisor did

assign the Child to work at a beach in the waning days of the 2013 aquatics season. This was an important demonstration of the Supervisor's authority over lifeguards such as the Child.

42. The totality of evidence established that Supervisor did have supervisory authority over the Child.

ISSUE: SEXUAL HARASSMENT/SEX-BASED HOSTILE WORK ENVIRONMENT

43. The Charging Party alleged the Respondent subjected her minor Child to sexual harassment in August 2013.
44. The Respondent countered that it was not aware of the alleged sexual harassment or any alleged hostile environment until June 26, 2014, and that upon learning of the alleged conduct, it took prompt action.

ANALYSIS

45. Minnesota Statute § 363A.08, subd.2(3) prohibits an employer from discriminating against a person with respect to terms, conditions, or privileges of employment because of an individual's sex.
46. The Act defines sexual harassment is a form of sex discrimination. Minn. Stat. § 363A.03, Subd. 13 (2015). Sexual harassment is defined as including both quid pro quo harassment and hostile environment harassment. See Minn. Stat. § 363A.03, Subd. 43 (1) - (3). See also *Frieler v. Carlson Mktg. Grp., Inc.*, 751 N.W.2d 558, 567 (Minn. 2008).
47. Hostile environment sexual harassment is defined as "unwelcome sexual advances, requests for sexual favors, sexually motivated physical contact or other verbal or physical contact or communication when ... that conduct or communication has the purpose or effect of substantially interfering with an individual's employment ... or creating an intimidating, hostile, or offensive employment ... environment." Minn. Stat. § 363A.03, Subd. 43 (2015).
48. To establish a claim for hostile work environment based on sex a plaintiff must prove: (1) she is a member of a protected group; (2) she was subject to unwelcome harassment; (3) the harassment was based on membership in a protected group; (4) the harassment affected a term, condition or privilege of her employment; and (5) the employer knew of or should have known of the harassment and failed to take appropriate remedial action. *LaMont v. Indep. Sch. Dist. No. 728*, 814 N.W.2d 14, 20 (Minn.2012).
49. The parties do not dispute the first or third factors: the Child is female, and the alleged conduct by the Supervisor was directly related to the Child's sex. The parties dispute the remaining factors.

***Subject to Unwelcome Harassment***

50. The Charging Party alleged the Child did not welcome the Supervisor's conduct.

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51. The totality of the circumstances of the work environment must be both objectively and subjectively offensive. *LaMont*, 814 N.W2d at 21-22. The severe and pervasive standard is not a "mathematically precise test." *Harris v. Forklift Sys., Inc.*, 510 U.S. 17, 22 (1993).
52. "The gravamen of any sexual harassment claim is that the alleged sexual conduct was unwelcome." *Thompson v. Campbell*, 845 F.Supp. 665, 673 (D.Minn.1994). "The threshold for determining that the conduct is unwelcome is whether it was uninvited and offensive." *Id.*
53. This investigation of this factor faced certain challenges; most obviously, there were no witnesses to the singular August 2013 incident beyond the Child and the Supervisor.
54. Despite these challenges, evidence was sufficient to establish that the treatment of the Child was unwelcome.
55. Parties did not dispute the August 2013 incident resulted in sexual intercourse between Supervisor and the Child in a Respondent lifeguard shack during work time.
56. There was no dispute there was a five year age difference between the Child and Supervisor. At the time of the August 2013 incident the charging party was within days of her 17<sup>th</sup> birthday.
57. There was evidence the Supervisor had professional authority over the Child. The Supervisor demonstrated his work site control authority over the Child when he placed her in the beach assignment, despite the Child being too young for the placement.
58. Regarding Supervisor's apparent authority over the Child, witnesses repeatedly referred to Supervisor as the Child's "boss." The Supervisor had the title of Aquatics Supervisor, while the Child was "Lifeguard." There was credible evidence the Child regarded the Supervisor as a "boss."
59. Particularly dispositive to this issue was the felony criminal "Statement of Probable Cause" against the Supervisor which summarized information provided to criminal investigators by both the Supervisor and the Child. This statement details how the Child indicated four times during the incident that she opposed the Supervisor's behavior. She told the Supervisor "it wasn't okay"; she told the Supervisor she "couldn't do this"; she said "We're done" when he indicated he was not finished with the sexual act; and that she declined the Supervisor's offer to continue the encounter with other sex acts.
60. Furthermore, according to the felony criminal "Statement of Probable Cause," the Supervisor's actions represented an understanding of the severity of his actions because he obtained Plan B emergency contraception for the Child immediately after the August 2013 sexual contact. Using Respondent equipment, on work time, to procure emergency contraception to prevent both the consequences of, and awareness of his sexual contact with a minor, subordinate employee established that the Supervisor was aware of the seriousness of his actions.
61. Based upon the credible versions of events, the differences in parties age, and the authority the Supervisor held over the Child, there was sufficient evidence to establish the sexual treatment

of the Child by the Supervisor in a respondent lifeguard shack during work hours was unwelcome.

62. Sufficient evidence established that the Child was subject to unwelcome harassment during her employment with the Respondent.

***Harassment Affected a Term, Condition, or Privilege of Employment***

63. The Charging Party alleged the unwelcome, sex-based treatment negatively affected a term, condition, or privilege of the Child's employment with the Respondent.
64. Analysis of this factor was complicated by the fact that the Respondent's aquatics' employees were seasonal employees. Investigative information indicated the August 2013 incident occurred during the final week of the 2013 aquatics season. It was, therefore, difficult to establish what, if any, immediate negative impact the encounter had on the Child's employment.
65. As will be discussed later, Respondent supervisors were made aware of the August 2013 incident in 2013 and again in 2014. At least two different supervisors, in two different years, had conversations with the Child about the August 2013 incident. The fact that the incident and its impact on the Child was repeatedly an issue for supervisors tended to indicate problems with the Child's employment.
66. Witnesses indicated that in 2014 the Child stated she was not comfortable working with the Supervisor. Because of this discomfort, the Child talked to coworkers about working at other facilities or switching beaches; however, it was not clear whether any of these alterations to conditions actually occurred.
67. Striking against the implication of a negative employment impact was the fact that lifeguard work is seasonal and the Respondent required lifeguards to reapply for employment every year. The Child reapplied, and was hired, for lifeguard employment with the Respondent in 2014 despite the August 2013 incident.
68. As evidence on this issue was inconclusive, this investigation will consider the Respondent's affirmative defenses appropriate in such circumstances. In circumstances without any tangible employment action against the employee, the employer may raise an affirmative defense to liability.

***Employer Knowledge and Appropriate Action / Affirmative Defense***

69. The fifth factor at issue in this analysis is whether the employer knew of or should have known of the harassment and failed to take appropriate remedial action. As this element effectively includes the factors of the respondent's affirmative defense, all issues regarding the Respondent's knowledge of the harassment, and what preventative actions it took in response to the harassment will be analyzed under one heading.
70. In *Faragher v. City of Boca Raton*, 524 U.S. 775, 570-71 (1998), the Minnesota Supreme Court recognized and adopted the affirmative defense articulated in *Ellerth*:

[A]n employer is subject to vicarious liability for an actionable hostile environment created by a supervisor with immediate (or successively higher) authority over a victimized employee. In circumstances when no tangible employment action is taken against the employee, the employer may raise an affirmative defense to liability or damages if it proves by a preponderance of the evidence: (1) 'that the employer exercised reasonable care to prevent and correct promptly any sexually harassing behavior,' and (2) 'that the plaintiff employee unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer or to avoid harm otherwise.'

Citing *Ellerth*, 524 U.S. at 765.

71. Evidence shows the Respondent's anti-harassment policy includes a prevention aspect. Employees were required to report any allegation of harassment. The "**Assault/Violation of Employee**" section states:

If you are assaulted, immediately call 9-9-1-1 and notify the Aquatics Supervisor. As precaution, lifeguards should never enter or leave beach facilities unaccompanied. (Emphasis added.)
72. The Respondent's anti-harassment policy also includes a corrective aspect in which management may take prompt and immediate action, including discharge of an employee for failure to abide by its anti-harassment policy.
73. The Respondent's argument on this point rests on the position that it first learned of the sexual harassment on June 26, 2014. Soon after that date, the respondent indicated it placed the Supervisor on a paid leave to conduct an investigation of the alleged sexual conduct.
74. The Respondent then alleged the Child knew of, yet failed to utilize, the anti-harassment policy's complaint process.
75. The Respondent's arguments were not persuasive in light of the investigative record.
76. "[A]n employee's knowledge of acts of sexual harassment should be imputed to the employer because the employee was 'clothed with supervisory and managerial authority over subordinates.'" *McNabb v Cub Foods*, 352 N.W.2d 378, 384 (Minn. 1984).
77. As previously analyzed, the Respondent employee who sexually harassed the Child was a supervisor. The Child and other Respondent staff viewed the Supervisor as "the boss." The Supervisor acted to alter the conditions of the Child's employment and indicated to investigators that he "hired" the Child. The Respondent also publicly held out the Supervisor as an aquatics supervisor.
78. The Supervisor's knowledge of his harassing behavior toward a female lifeguard (e.g. subordinate) was, therefore, imputed to the Respondent.

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79. There were other significant problems with the Respondent's notice defenses which primarily rested upon claims that the Child failed to utilize the anti-harassment policy.
80. Firstly, the "Assault/Violation of Employee" section of the handbook specifically states the person to contact is the Aquatics Supervisor; however, in this instance the sexual harasser was the Aquatics Supervisor. This section of the Respondent's Beach Operations Manual did not list any other Respondent employees which lifeguards could contact in assaultive or violative circumstances.
81. Secondly, there was the issue of the Child reporting the August 2013 incident to different supervisors, once in 2013 and again in 2014.
82. In late August 2013, the Child told a Respondent park services coordinator about the sexual encounter. Despite knowing of the parties age difference and that the Supervisor "was the boss," the park services coordinator did not "manifest any concern about this incident." The Child was encouraged to speak with a relative who worked for the Respondent; however, the park services coordinator took no other action.
83. In June of 2014, a senior lifeguard instigated her own investigation, resulting in a report to Respondent human resources, after the Child "made an off-hand comment [...] that she had a sexual encounter with [Supervisor] in 2013." (Emphasis added.)
84. The Respondent's position that the Child's alleged failure to follow reporting procedure failed in light of the different reactions by Respondent supervisors in response to learning of the same issue (e.g. a significantly older supervisor had a sexual encounter with a minor lifeguard on Respondent property during the workday). It was disingenuous for the Respondent to claim the a minor, first-year lifeguard "unreasonably" failed to utilize preventative or corrective procedures, yet not expect the same from older, more experienced, supervisory-level staff.
85. The park services coordinator's 2013 inaction eroded the credibility of the Respondent's arguments while firmly establishing that the Respondent had notice of the Supervisor's sexual harassment toward the Child as of the end of August 2013.
86. Finally, there was insufficient evidence the Respondent exercised reasonable care to prevent and correct promptly any sexually harassing behavior.
87. The only action taken by the Respondent was to place the Supervisor on paid administrative leave and report his behavior to the county attorney.
88. The Respondent failed to produce accurate records indicating it conducted an immediate and complete investigation of the Supervisor's actions. The respondent failed to adequately explain why it suspended whatever investigation it had initiated or why it took no corrective action.
89. The Respondent produced no notice the Supervisor would be ineligible for rehire after his resignation. There was no evidence the Respondent changed any of its lifeguard

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scheduling/staffing policies. There was no evidence the Respondent analyzed or altered any of its harassment or complaint policies. There was no evidence that it administered any sexual harassment training in light of the Supervisor's actions.

90. In sum, as far as maintaining its own employment policies and procedures (as opposed to enforcing violations of criminal law) there was no evidence the Respondent took any action to correct these issues, aside from accepting the wrongdoer's resignation as resolving the matter.
91. The Respondent cannot successfully raise an affirmative defense here because it cannot demonstrate it exercised reasonable care to prevent and correct promptly the sexually harassing behavior after it received notice of the Supervisor's actions.
92. In sum, this investigation determined the Respondent had notice of the Supervisor's actions in August of 2013, but took no action until late June of 2014. After suspending the Supervisor with pay, the Respondent failed to take any action whatsoever to prevent future sexual harassment.

CONCLUSION

93. The greater weight of evidence in this matter supports the conclusion that the Charging Party's minor child was subject to a sex-based hostile work environment during her employment with the Respondent.
94. Accordingly, the Department finds that there is **PROBABLE CAUSE** to credit the Charging Party's claim that the Respondent violated Minnesota Statutes, §363A.08, subd. 2(3).



## CHARGE OF DISCRIMINATION

Department of Human Rights  
625 Robert St N  
Saint Paul MN 55155  
651-539-1100  
Toll-Free 1-800-657-3704  
TTY 651-296-1283

Any person claiming to have been discriminated against because of race, color, creed, religion, national origin, sex, sexual orientation, marital status, disability, age, public assistance status or familial status, as provided for in Chapter 363A of the Minnesota Statutes in the areas of employment, real property, public accommodations, public services, education, credit or business contracts may file a charge within one year after the alleged discriminatory act with the Minnesota Department of Human Rights at the above address.

### DEPARTMENT OF HUMAN RIGHTS USE ONLY

Case Number

Acknowledged by

Date Filed:

8/12/2014

Date Docketed:

1. CHARGING PARTY

Tammera Diehm obo minor child  
5125 Saint Moritz DR  
Columbia Heights, MN 55421

2. RESPONDENT

County of Ramsey  
15 W Kellogg Blvd  
Saint Paul, MN 55102

3. The discrimination was because of:  
Sex

4. The discrimination was in the area of:  
Employment

5. Describe the discriminatory act, setting forth in statutory language the violation of Minnesota Statutes, §363A:

I am filing on behalf of my minor child who is seasonally employed with the above-named respondent. My minor child was seasonally employed with the respondent last year as a lifeguard, my minor child's worksite was located at 2401 Upper Afton RD, Maplewood, MN 55111.

On or about August 13, 2013 my minor child was assigned to work the day with the aquatics supervisor. The aquatics supervisor instructed my child that she would be assigned to working with him for the day. The aquatics supervisor drove my child to a closed beach and sexually assaulted my child.

My child reported the incident to another supervisor. The supervisor did nothing about my child's statement. The aquatic supervisor continued to work in his same capacity with other minors. This incident was so severe that standing alone, it established a hostile work environment.

I believe my child's sex was a factor in the respondent's actions. My child was sexually assaulted by her supervisor. When the report was made to the respondent no action was taken.

I therefore allege that the above-named respondent has discriminated against my minor child in the area of employment on the basis of sex in violation of Minnesota Statutes, §363A.08 Subd. 2(2).

CS 0814

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Subscribed and sworn to before me this

12<sup>th</sup> day of August 2014

Thomas L. Barnette  
Notary Public

I swear or affirm that I have read this charge and that it is true to the best of my knowledge, information, and belief. I understand that the data contained on this form may be made public.

Tamara R. Dill  
(Signature of Charging Party)

